UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JANELL, INC.

and **Case 9-CA-34095**

GENERAL TRUCK DRIVERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS LOCAL UNION NO. 957, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Deborah Jacobson, Esq.,
for the General Counsel
Paul R. Moran, Esq.,
Curtis L. Cornett, Esq., and
David M. Fingerman, Esq.
for the Respondent
John R. Doll, Esq.,
for the Union

DECISION

INTRODUCTION

ALBERT A. METZ, Administrative Law Judge. This case was heard at Cincinnati, Ohio on December 5, 1996.[1] The General Truck Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 957, affiliated with the International Brotherhood Of Teamsters, AFL-CIO (Union) has charged that Janell, Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act). The primary issues are whether Respondent is a successor employer, and, if so, what its bargaining obligations are to the Union.

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1 All subsequent dates refer to 1996 unless otherwise indicated.

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I further find that the Union is an organization in which employees participate and that it exists, in whole or in part, for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.

I. BACKGROUND

The Respondent operates a building supply distribution business. On June 28, 1996, the Respondent purchased the Dayton, Ohio business location of Dayton Builders Supply Company (DBS). At the time of the purchase, DBS had a collective bargaining contract with the Union covering its yard employees.[2] The Respondent was aware these employees were represented by a union when it purchased the business. At that time of the sale there were three DBS employees doing work in the unit. The Respondent made offers of employment to all three of these individuals, and two accepted. Another DBS employee was immediately moved into a yard man position so there were still three men working in the unit when the Respondent commenced operations. The yard men continued working in the same jobs at the same pay rate as they had when employed by DBS.

The purchase agreement between DBS and the Respondent states that the following items were to be purchased: real estate, certain office furnishings, lifts, cars, trucks, office equipment and customer lists. The sale allowed the two parties to mutually use the same telephone number for a period of time. The Respondent immediately began operations at DBS' Dayton location dealing in basically the same products as DBS. The Respondent concedes that it substantially continued the business of DBS. (R. Brief p. 2)

II. THE HIRING OF DBS EMPLOYEES

Janell is managed by Jack Roth and his son, Andy Roth. Before taking over the business the Roths gave DBS a document to use in discussing the impending purchase with the employees. In pertinent part that document states the Respondent's intent towards hiring the DBS employees:

> <u>Dialogue guidelines with Dayton Supply Employees</u>
> Janell Inc. would like your conversation to employees in reference to Janell to be limited to:
>
> ***
>
> Terms of the negotiation related to employment:
> Each DBS employee will have the opportunity to work with Janell Inc.
> Each DBS employee should expect their job and salary to remain constant.

[2] All leadmen, semi-drivers, straight job drivers, hoist men, warehousemen, steel men, helpers and yard men excluding office personnel and those excluded by law.

> Each DBS employee is expected to cooperate fully in the conversion. Each DBS employee is viewed as a vital resource to the success of the business.
>
> ***
>
> The next step will be to meet with Jack Roth and Andy Roth. They will orient you to Janell. A tour will most likely be scheduled for you to tour their Cincinnati location and meet other Janell employees. (G.C. Exh. 4)

Employee Tim Pietrzak testified that he attended an employee meeting where DBS announced the sale of the business to the Respondent. DBS owner, Tom Langton, told the employees that all of their pensions, sick time and vacations would be paid. Langton also told them that they would be pleased working for the Respondent and would probably be happy with the change.

Pietrzak testified that he was interviewed by Jack Roth on June 28. Roth said that the Respondent wanted all of the DBS employees to stay and work for them. Roth assured him that he would be happy working for the Respondent and that he would continue to do the same work. Pietrzak accepted the offer of employment and was told to see Roth's daughter, Jenny, and get a packet of forms to fill out concerning taxes and insurance. Pietrzak later discovered that he was being charged for his health insurance when he saw the deduction on his pay check. This was his first indication of a change as DBS had paid the entire cost for single coverage. Pietrzak was equivocal as to exactly what Roth told him concerning benefits in the interview. He first denied that anything was mentioned to him about any changes in his job or benefits. On cross-examination Pietrzak conceded that Roth told him the Respondent "had this and had that" but denied he was shown a paper that described the Respondent's benefits. Pietrzak recalled the subjects they discussed included life insurance, hospitalization insurance, and the fact the Respondent was a nonunion company.

Employee Donald DeHart testified that Jack Roth also interviewed him on June 28. Roth told him his wages and duties would remain the same. The only change Roth pointed out to DeHart was that the Respondent was a nonunion company. DeHart said that he would take the job. DeHart later received a packet of forms to fill out and he knew from the forms there was medical insurance coverage for employees.

Jack Roth testified that he used a check list of items to serve as a reminder of the conditions under which the employees would be hired. This document was not shown to the employees. Roth remembered he discussed hospitalization insurance, vacations, pay scheduling, holidays, sick days, profit sharing, and Saturday work with the employees. He also told the yard men that the Respondent was a nonunion company. Roth extended the offer of employment to the employees before he mentioned the subject of benefits. Roth confirmed that the employees received insurance papers to fill out after they were hired. I find that after he hired Pietrzak,

Roth did discuss with him the benefits that Respondent had for its employees. Considering the demeanor of the witnesses and comparing their certainty of testimony, I find that Roth did not discuss benefits with DeHart in his interview.

The Respondent changed the employees' terms and conditions of employment when it commenced operations. Those changes included:

1. Pay periods were changed from being paid every week to every two weeks.

2. Employees received paid sick leave under DBS. The Respondent eliminated this benefit.

3. DBS health insurance for single coverage was free. The Respondent required the employees to pay for their single coverage plan.

4. DBS had a pension plan. The Respondent did not have such a plan.

5. Vacations at DBS could be taken whenever the employee wanted. The Respondent allows two weeks vacation during the weeks of July 4th and Christmas.

III. UNION'S DEMAND FOR BARGAINING

On July 15 the Union's counsel, John R. Doll, sent Jack Roth a letter noting that a majority of the DBS yardmen had been hired by the Respondent. Doll demanded to meet and bargain with the Respondent over the terms and conditions of employment of the unit employees. The letter also asked the Respondent to contact him to set the date for a bargaining meeting. Roth did not respond to the letter. On August 9 the Respondent filed the charges in this case. On August 26 Respondent's counsel, Paul R. Moran, replied to Doll's letter. Moran took the position that the Respondent was not a successor to DBS and thus it had no obligation to bargain with the Union.

IV. HIRING OF WORKERS PAID BY PCS

On July 20 the Respondent hired Larry Weng to supervise the yard men. He decided help was required in order to run the yard. Weng discussed this need with Jack Roth who agreed to the hiring of additional yard men. No new yard employees had been sought before Weng's recommendation. Roth told Weng that anyone hired would be paid by P. C. S. Technical Services, Inc. (PCS), an employment contract service. Weng testified that the PCS employees were considered "temporary." On July 24 the Respondent hired Boone Meade to work in the yard. He was hired as an employee on the payroll of PCS. On August 8 the Respondent hired a fifth yard man, James Yarborough, under the same arrangement with PCS. The PCS employees are joint employees of PCS and the Respondent. They receive pay and benefits from PCS that are different from what the Respondent's unit employees receive. The PCS

employees do the same yard work as Respondent's employees and are supervised by Weng.

V. ANALYSIS OF THE SUCCESSORSHIP ISSUE

The Government contends that the Respondent's purchase of DBS made it the successor employer of the unit employees with the attendant bargaining obligations associated with such a status. More specifically the Government asserts that the Respondent made it "perfectly clear" that it intended to hire all of the unit employees and that it was thus obligated to bargain with the Union before establishing initial terms and conditions of employment. The Respondent concedes it is a continuation of the DBS business. It argues, however, that the Union did not represent a majority of employees in the unit because a substantial complement of employees was not hired until all five yard men were employed.[3] The Respondent argues that because a nonunit DBS employee was transferred to work as a yard man, and two PCS employees were later hired, there was no representative complement of unit employees until at least the last PCS hire.[4] It is asserted that these employees should be counted in determining majority status and on that basis the Union never represented a majority of employees. Thus, the Respondent had no obligation to bargain with the Union.

I find that the Respondent did hire a representative complement of employees when it commenced operations. The Respondent started its operations by continuing to use three DBS employees as its entire yard staff. No additional help was sought until the Union made its demand for bargaining and Weng made his recommendation for more help. At that point the Respondent chose not to hire its own employees, but hired two workers employed by PCS. I further find that Pietrzak and DeHart were carryover unit employees from DBS and that the Union represented a majority of the unit employees from the commencement of the Respondent's operations as the successor employer of PCS.

The Supreme Court in ***NLRB v. Burns Security Services***, 406 U.S. 272, 294-295 (1972) established:

> [a]lthough a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the

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[3] The Respondent does not contest that a majority of its Dayton work force was hired from the DBS employees. See, e.g., ***Helnick Corp.,*** 301 NLRB 128 fn. 1 (1991).

[4] The Respondent would include the PCS employees in the unit and questions the continued viability of ***Greenhoot, Inc.***, 203 NLRB 250 (1973)(Leased employees not included in unit for representational case purposes absent consent of all parties). See: ***Jeffboat Division, American Commercial Marine Service Co. & T.T.O. Enterprises, Inc.,*** 9-UC-406 review granted by Board on May 3, 1996.

> employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act, 29 U.S.C. §159(a).

In ***Spruce-Up Corp.***, 209 NLRB 194, 195 (1974), enfd, 529 F.2d 516 (4th Cir. 1975), the Board discussed the "perfectly clear" doctrine:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those term, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit" as that phrase was intended by the Supreme Court....
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> We believe that the caveat in ***Burns***, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer...has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. [5]

The Respondent stated in its pre-purchase document given to DBS the intent to hire all of the employees. In the same document the Respondent promised that: "Each DBS employee should expect their job and salary to remain constant." The intent was reaffirmed when Jack Roth interviewed the yard men and told them he wanted to hire all of the DBS employees. Roth also stated that their wages and jobs would stay the same. Roth did not mention benefits to Pietrzak until after he had accepted employment. Roth did not discuss benefits with DeHart. I find that the Respondent unquestionably intended to hire all of the DBS employees, and that it failed to clearly announce its intent to establish a new set of conditions prior to inviting the DBS employees to accept employment. The Respondent's bargaining obligation thus occurred when it commenced operations, and it was at this time that it was required to consult with the Union in establishing initial terms and conditions of

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[5] See also: ***Canteen Co.***. 317 NLRB 1052 (1995)(Respondent did not announce new wage rates until after it had effectively announced its intent to retain the predecessor's employees); ***Fremont Ford***, 289 NLRB 1290 (1988)(employer told union it had doubts about retention of only a few unit employees; employer's stated desire to change seniority and institute a flat rate insufficient to indicate intent to establish new employment conditions); ***Roman Catholic Dioceses of Brooklyn***, 222 NLRB 1052 (1976) enf. denied in relevant part sub nom. ***Nazareth Regional High School v. NLRB***, 549 F.2d 873 (2d Cir. 1977)("perfectly clear" may be established even before job interviews by statements of intent to hire majority of predecessors employees.)

employment. ***A-1 Schmidlin Plumbing Co.***, 284 NLRB 1506, 1508 (1987).[6] Accordingly, I find that by changing the terms and conditions of the unit employees without consultation with the Union the Respondent has violated Section 8(a)(1) and (5) of the Act. ***Hilton's Environmental***, 320 NLRB 437-438 (1995); ***Kirby's Restaurant***, 295 NLRB 897, 901 (1989).

The Respondent did not consult with the Union before it hired the PCS employees to perform unit work. The PCS employees were hired under different terms than other employees working in the unit. As the Respondent's obligation to bargain with the Union arose at the time of its acquisition of DBS, the hiring of PCS employees was a unilateral action. I find that the Respondent additionally violated Section 8(a)(1) and (5) by hiring the PCS employees without giving the Union an opportunity to bargain about the matter.

CONCLUSIONS OF LAW

1. Janell, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. General Truck Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 957, affiliated with the International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for collective bargaining purposes:

> All leadmen, semi-drivers, straight job drivers, hoist men, warehousemen, steel men, helpers and yard men excluding office personnel and those excluded by law.

4. The Union is the collective bargaining representative of the Respondent's employees in the above-described unit and the Respondent has had a duty to recognize and bargain with the Union since its June 28, 1996, purchase of DBS's Dayton, Ohio facility.

5. Respondent violated Section 8(a)(1) and (5) of the Act by engaging in the following conduct:

(a) Refusing to recognize and bargain with the Union, and making unilateral changes to unit employees terms and conditions of employment.

(b) Hiring joint employees to do unit work under terms and conditions of employment at variance from other unit employees without notice to or bargaining with the Union.

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[6] Compare: ***Specialty Envelope Co.***, 321 NLRB No. 118 slip op. at 5 (Jul. 26, 1996)

6. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent, is in violation of Section 8(a)(1) and (5) of the Act, the Respondent shall cease and desist from making unilateral changes and refusing to recognize and bargain with the Union, and the Respondent shall make whole its employees for any loss of pay or other benefits they may have suffered as a result to such unlawful conduct, in the manner prescribed in ***Ogle Protection Service***, 183 NLRB 682 (1970), with interest as prescribed ***New Horizons for the Retarded***, 283 NLRB 1173 (1987). The Respondent shall also reimburse its unit employees for any expenses ensuing from the Respondent's unlawful failure to make the required benefit payments as set forth in ***Kraft Plumbing & Heating***, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in ***New Horizons for the Retarded***, supra. The Respondent shall also remit all fringe benefit amounts which have become due. Any additional amounts due the employee benefit funds shall be as prescribed in ***Merryweather Optical Co***., 240 NLRB 1213, 1216 fn. 7 (1979). See: ***Hilton's Environmental***, 320 NLRB 437, 439 (1995).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[7]

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Janell, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Refusing to recognize and bargain with the Union, and making unilateral changes to unit employees terms and conditions of employment.

(b) Hiring joint employees to do unit work under terms and conditions of employment at variance from other unit employees without notice to or bargaining with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole unit employees for any loss of earnings and other benefits suffered as a result of the unilateral changes and refusal to bargain with the Union, in the manner set forth in the remedy section of this decision and, upon request of the Union cancel any such changes in terms and conditions of employment until such time as the Respondent bargains in good faith with the Union to an agreement or to an impasse.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All leadmen, semi-drivers, straight job drivers, hoist men, warehousemen, steel men, helpers and yard men excluding office personnel and those excluded by law.

(d) Within 14 days after service by the Region, post at its facility in Dayton, Ohio, copies of the attached notice marked "Appendix." [8] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 9, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated Washington, D C

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Albert A. Metz
Administrative Law Judge

[8] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with General Truck Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 957, affiliated with the International Brotherhood of Teamsters, AFL-CIO as the exclusive bargaining representative of our employees in the unit described below, by refusing to recognize and bargain with the Union as the collective bargaining agent for the unit employees and by unilaterally implementing changes in terms and conditions of employment of these employees

WE WILL NOT hire joint employees to do unit work under terms and conditions of employment at variance from other unit employees without notice to or bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All leadmen, semi-drivers, straight job drivers, hoist men, warehousemen, steel men, helpers and yard men excluding office personnel and those excluded by law.

WE WILL make whole our employees in the above-described unit for any loss of earnings and other benefits resulting from our refusal to recognize and bargain with the Union and by our unilateral changes in terms and conditions of employment

WE WILL, upon request of the Union, cancel any unilateral changes we made to the unit employees' terms and conditions of employment until such time as we bargain in good faith with the Union to an agreement or to an impasse

JANELL, INC.
(Employer)

Dated:_____ **By**: _____
(Representative) **(Title)**

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, 550 Main St., Room 3003, Cincinnati, OH 45202-3271. Telephone 513-684-3663.